

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Appeal of:

John M. Egan,
Petitioner

v.

Docket Nos. VS-07-851

Department of Veterans' Services,
Respondent

Appearance for Petitioner:

John M. Egan
121 Nontuck Street
Apt. B12
Holyoke, MA 01040

Appearance for Respondent

Lawrence J. Feeney, Esq.
Department of Veterans' Services
600 Washington Street
Suite 1100
Boston, MA 02111

Administrative Magistrate:

James P. Rooney, Esq.

Decision

John M. Egan appeals an October 15, 2007 decision by the Department of Veterans' Services terminating his veterans' benefits for failure to comply with an individual service plan designed to remedy a history of drug and alcohol abuse. The Department, after a hearing by phone, affirmed a decision by the Holyoke Department of Veterans' Services office to terminate Egan's benefits for violating 108 CMR 7.03(1)(c), 8.05(1)(2), and 3.06(1)(b). Mr. Egan timely appealed.

I held a hearing on January 28, 2008 at the offices of the Division of Administrative Law Appeals, 98 North Washington Street, Boston. The Division of Veterans' Services placed four

documents in evidence. (Exs. 1-4). It presented testimony from Kristian Lecca, the Veterans' Agent for the City of Holyoke. Mr. Egan testified for himself. I made one tape of the hearing. I reopened the hearing on April 29, 2008 for the sole purpose of accepting the "notice of action" terminating Egan's benefits into the record. The Department filed the notice of action on May 5, 2008. On that date, I placed this document into evidence as Exhibit 5 and closed the record.

Findings of Fact

1. John M. Egan is an honorably discharged veteran of the U.S. Navy. He served from October 24, 1964 to October 17, 1968. Ex. 1; Egan Testimony.

2. He has received veterans' benefits intermittently from 1976 on. Ex. 1. He initially received benefits because of a broken hand. Egan testimony. His next period of benefits began in 1982.

3. From 1982 though 1988 he was employed by the Metropolitan District Commission at the Quabbin Reservoir. He resigned from that job after a ten day suspension and admitted he had an alcohol problem. Ex. 1.

4. Thereafter, he sought medical help for his alcohol problem and attended Alcoholics Anonymous meetings, but by January 1991 he had been admitted for a third time to the Northampton VA Medical Center, which diagnosed him with alcohol dependency, "poly-substance drug abuse" (including intravenous drug use), and chronic obstructive pulmonary disease. Ex. 1.

5. In February 1991, he applied for veterans' benefits from the Holyoke Veterans' Services Department. The Department turned down his request after finding that he had been voluntarily unemployed since 1988. Ex. 1.

6. In 1994, Egan entered the Leeds VA Medical Center in Gardner for a 21 day detoxification program, following which he resided in a halfway house. This VA in-patient program helped him to be sober for as much as six years. Egan testimony; Ex. 3.

7. After he left the halfway house, he worked as a cook at the Leeds VA Medical Center, but was hospitalized in 2002 with an “emotional breakdown” and then a fractured elbow. During the time he was out of work, he received veterans’ benefits. When he returned to work at the VA Medical Center, his benefits were terminated. Ex. 1.

8. Egan, by then, was again abusing alcohol and drugs, including heroin. Near the end of 2004, he resigned his position at the Leeds VA Medical Center because he believed he was going to be fired for failing to fulfil the terms of a “last chance agreement” with his employer. That agreement required him to enter a substance abuse program and document his attendance. He did not enter a treatment program. Ex. 1.

9. After he left his job, he applied for veterans’ benefits from the Chicopee Office of Veterans’ Services. He received benefits, but was terminated in February 2005 when he began to receive unemployment benefits. Ex. 1.

10. By mid-2006, Egan reapplied for veterans’ benefits in Holyoke. The Holyoke Veterans’ Services Department granted his application. He had to repay some of the benefits when his claim for Social Security disability came through retroactively, but the Holyoke office resumed paying him veterans’ benefits in January 2007. Ex. 1.

11. Egan had by then relapsed into drug and alcohol abuse. He voluntarily admitted himself for treatment at an unknown facility in September 2006. In 2007, he entered a medical facility known as the Brattleboro Retreat for detoxification six times: from February 28 through

March 5, from April 2 through April 4, from May 14 through May 18, from May 31 through June 5, from June 26 through July 2, and from July 17 through July 20.¹ He also returned to the Northampton VA Medical Center for treatment from April 8 through April 10, 2007. Ex. 3.

12. On each admission, he reported use of both drugs and alcohol, mainly beer, vodka, and heroin. He was cooperative with the treatment offered, but he repeatedly relapsed into drug and alcohol use within a few days of his discharge. Ex. 3.

13. In April, 2007, the Northampton VA Medical Center offered to refer him to a 21 day substance abuse treatment program. He declined. In May, 2007, he discussed a “partial hospitalization program” with Brattleboro Retreat, but ultimately decided not to pursue this option. Ex. 3.

14. In June 2007, he admitted to the Holyoke office that he had relapsed into substance abuse and had enrolled in a weekend treatment program at Brattleboro Retreat from June 8 through 11. Ex. 1.

15. On June 15, 2007, the Holyoke office responded by issuing him a notice of intent to terminate his benefits. It ultimately agreed to continue paying benefits so long as he adhered to an individual service plan that required him to enroll in a treatment program at the Holyoke Medical Center, verify his attendance at the treatment program, agree to random drug testing, and report to the Holyoke office each Tuesday. Egan signed the agreement on June 26, 2007. Ex. 1.

16. He attended only one session at the Holyoke Medical Center. Ex. 2. He testified that he did not attend any other sessions because he came down with food poisoning after the first

¹ While the Brattleboro Retreat’s medical records placed in evidence do not mention any treatment from June 8-11, 2008, veterans’ agent Kristian Lecca, in a memo accompanying Egan’s individual service plan, notes treatment on those dates.

session. Egan testimony.

17. David Avakian, the patient coordinator at the Holyoke Medial Center, told Kristian Lecca, the Holyoke Veterans' Services Agent, that Egan was not treatable in a day program and that he had refused an opportunity to enroll in an in-patient treatment program because he feared he would lose his veterans' benefits if he did. Avakian thought Egan's response was part of a pattern of treatment avoidance. Lecca, in a report of the conversation, noted that she as well was familiar with Egan "finding reasons not to get rehab." Ex. 2; Lecca testimony.

18. Egan provided a urine sample while at Holyoke Medical Center, but did not report to the Holyoke office during the first two weeks in July 2007. Ex. 2.

19. On July 16, 2007, the Holyoke Veterans' Services Department issued a notice of action informing Egan that it would terminate his benefits as of August 5, 2007 for violating 108 CMR 7.03(1)(c), 108 CMR 8.05(1)(2), and 108 CMR 3.06(1)(b). The notice recited:

In accordance with ISP [individual service plan] dated 6/21/07 [the] veteran failed to provide evidence of uranalysis examination, as requested, in order to prove unwholesome habits have been remedied. Veteran has exhibited uncooperative behavior. He failed to report for week ending 7/14/07, also required in the ISP. Prior history and recent medical history indicate substance abuse and subsequent failure to comply with Holyoke VSO [Veterans' Services Office] Individual Service Plan.

Ex. 4.

20. Egan appealed the decision.

21. On July 20, 2007, after three days at Brattleboro Retreat, he met with a social worker there named LeBrec to discuss further treatment. Egan testimony; Lecca testimony. LeBrec sought to arrange long term in-patient treatment for Egan. Egan testified that he did not refuse to enter a long term treatment program. Rather, he simply questioned where the money to pay for it

would come from and was not told by LeBrec that any assistance would be forthcoming. Egan testimony.

Lecca testified that she spoke to LeBrec while Egan was in LeBrec's office, told LeBrec she could obtain six weeks funding for treatment, and asked for an immediate decision because the money was available. Lecca testimony.

Egan discharged himself from Brattleboro retreat without entering an in-patient treatment program. Lecca testimony. Before doing so, Egan and LeBrec contacted halfway houses to see if he could be admitted to any for treatment. Most had significant waiting periods before a bed became available. LeBrec scheduled an interview with one of them for Egan, but he did not end up being admitted there. Ex. 3; Egan testimony.

22. Egan, on his own, contacted four or five halfway houses to see if he could be admitted.² Lecca testimony. Each he contacted had waiting lists ranging from two to six months. He did not put himself on any of the waiting lists. He testified that he declined to put his name on a waiting list because social worker LeBrec told him to try to seek treatment as soon as possible. Egan testimony.

23. On September 18, 2007, the Department of Veterans' Services held a hearing by phone on Egan's appeal. On October 15, 2007, it issued a decision affirming the Holyoke office's denial of benefits. It found that Egan had not followed the terms of his service plan and concluded that the Department of Veterans' Services can "no longer play a part in the financial

² The record is not entirely clear to what extent he contacted halfway houses separately from the effort he and social worker LeBrec made. The parties agree that Egan told the Holyoke office he wished to explore halfway house opportunities on his own. I assume that his testimony about the efforts he made to do so referred to his own actions after he left the Brattleboro Retreat rather than the actions of LeBrec while he was still at the Brattleboro Retreat.

support of [his] unwholesome habits.” Ex. 5.

24. In a letter dated October 18, 2008, Egan appealed that decision to the Division of Administrative Law Appeals.

25. There is no evidence that Egan obtained any substance abuse treatment between the time of his appeal and the hearing. He testified that he had been sober for three weeks prior to the January 28, 2008 hearing. He also testified that he has no objection to entering an in-patient substance abuse treatment program. Egan testimony.

Conclusion

The decision of the Department of Veterans’ Services affirming the termination of benefits to John M. Egan by the Holyoke Veterans’ Services Department office is affirmed. There is no evidence the veterans’ agent abused her discretion when she determined that Egan had failed to cooperate in maintaining his eligibility for benefits by adhering to his individual service plan for his substance abuse problems or that the Department of Veterans’ Services lacked adequate grounds to affirm the termination of benefits.

A veteran is not automatically disqualified from receiving veterans’ benefits simply because he has a substance abuse problem. However, a veteran may be disqualified from receiving benefits if his “continuous unwholesome habits [have] produced the need for benefits.” 108 CMR 3.06(1)(b).

The Department of Veterans’ Services’ regulations set forth the manner in which an application from a veteran with substance abuse problems, who is obtaining treatment for those problems, is to be handled. The regulations provide that:

The veterans’ agent shall handle a benefits application from an applicant participating in a

substance abuse or other rehabilitation programs in the same manner as any other application. Prior to making a recommendation on benefits payments to the applicant, the veterans' agent shall discuss his or her substance abuse or other problem with the applicant. In substance abuse cases and before making a favorable recommendation, the veterans' agent shall have a reasonable belief that the applicant recognizes his or her substance abuse problem and has a sincere desire to be rehabilitated.

108 CMR 7.03(1)(a).

Once a veteran who has a substance abuse problem is granted veterans' benefits, the veterans' agent has an obligation to "closely supervise" his case. 108 CMR 7.03(1)(c). The veteran in turn, just like any veteran receiving benefits, is required to "reasonably cooperate with the veterans' agent and DVS [Department of Veterans' Services] in the processing of his or her application and maintaining his or her eligibility." 108 CMR 8.05(1). The veterans' agent "shall determine what constitutes reasonable cooperation on the basis of facts peculiar to each case."

108 CMR 8.05(1).

If the agent determines that a benefit recipient is not reasonably cooperating, she shall "issue a written Notice of Intent ... that failure to cooperate may result in suspension of benefits." 103 CMR 8.05(2). If the recipient "persists in his ... failure to cooperate, the veterans' agent shall issue a Notice of Action" that states when and why benefits are to be terminated. 108 CMR 8.05(2) and 108 CMR 8.03.

Here, there is no evidence that Egan's 2006 application for veterans' benefits was processed based on the notion that Egan had a substance abuse problem at the time. That he still was using drugs and alcohol came to the Holyoke office's attention in June 2007 when Egan admitted he still had a substance abuse problem for which he had just been treated at the Brattleboro Retreat. Because the eligibility of a substance abusing veteran for benefits depends

on his acknowledgment of the problem, a sincere desire to rectify it, and enrollment in a treatment program, veterans' agent Lecca acted appropriately when she issued a notice of intent to terminate Egan's benefits unless these conditions of eligibility could be established.

The June 26, 2007 individual service plan established the ground rules by which Egan could continue to be eligible for benefits. It required that Egan receive substance abuse treatment at the Holyoke Medical Center, be subject to random drug tests, and report to the Holyoke office once per week. Egan signed the individual service plan at the time and did not object to its terms at the hearing. Egan testimony.

He adhered only to some of its terms. He went once to the Holyoke Medical Center. Even crediting his testimony that he did not attend any other sessions because he developed food poisoning some time after the first session, he did not comply with the requirement that he verify to the Holyoke office that he attended the Medical Center's day treatment program. He also did not report to the Holyoke office each week, as he was required to do.³

Moreover, when veterans' agent Lecca contacted the Holyoke Medical Center, David Avakian, a patient coordinator there told her that the Center had told Egan he was not treatable in a day program, but needed in-patient treatment. Avakian said that Egan was offered an in-patient treatment program, but turned it down. Egan gave a reason for declining this offer – he thought entering an in-patient treatment program would terminate his eligibility for veterans' benefits. Whether or not this was Egan's genuine belief – both Avakian and Lecca thought that this was

³ It is not clear whether Egan complied with the random drug testing requirement of the individual service plan. He was evidently tested the one time he went to the Holyoke Medical Center. Whether the Holyoke office sought to test him on any other occasion is not in the record. Thus, no violation of this term of the individual service plan was established.

part of a pattern of finding reasons to avoid going to rehabilitation – there is no evidence in the record that participation in an in-patient treatment program would necessarily terminate a veteran's eligibility for benefits. That would be particularly unlikely here as Lecca accepted the Holyoke Medical Center's conclusion that Egan ought to be treated at an in-patient program.

The Holyoke office possessed this information when it issued the notice of action terminating Egan's veterans' benefits. The information showed that Egan had failed to comply fully with his individual service plan and failed to take the treatment step recommended by the Holyoke Medical Center, and thus provided sufficient grounds to terminate Egan's benefits.

Egan does not dispute Lecca's depiction of events prior to the issuance of the notice of action or her conclusion that he should enroll in an in-patient substance abuse program. Rather, he asserts that subsequent events demonstrate that he both desires treatment and has made appropriate efforts to obtain it.

Lecca's testimony made it clear that the Holyoke office would have kept providing Egan with veterans' benefits if he had enrolled in an in-patient treatment program after the notice of action was issued. The record also makes abundantly clear the reasonableness of the Holyoke office's ultimate conclusion that Egan should be treated at an in-patient substance abuse program. Egan has a long term history of substance abuse with frequent relapses after short term treatment; the only success he has had in maintaining sobriety for an extended period of time came after participation in a 21 day in-patient treatment program. Because he did not enroll at an in-patient program, the only question is whether he was reasonably cooperative with efforts to obtain him such treatment.

Whether a veteran has been reasonably cooperative is for the veterans' agent to

determine. 108 CMR 8.05(2). Here, the information Lecca possessed provided a reasonable basis for her to conclude that Egan was not being sufficiently cooperative with efforts to obtain in-patient treatment for him. In July 2007, Egan turned down an opportunity for in-patient treatment that the Holyoke Medial Center offered to arrange. Later that month, after he admitted himself to the Brattleboro Retreat, Lecca spoke to a social worker there when Egan was in the social worker's office and was about to be released. There is no dispute that on that occasion Egan spoke to the social worker about in-patient treatment that could begin immediately and that Egan questioned how it would be paid for. I credit Lecca's testimony that the social worker then spoke to her by phone while Egan was still there and that Lecca sought to allay Egan's concerns about paying for in-house treatment by arranging for funding for it. Whether Egan understood this is not entirely clear from the record; he says the social worker failed to convey the availability of funding. But whether he understood that funding was available and was simply finding an excuse to avoid treatment, as Lecca believes, or he did not grasp that funding was available and sincerely desired treatment, as he claims, I find that Egan was offered an opportunity for in-patient treatment that would be paid for and that he did not take this opportunity. Under these circumstances, Lecca had a basis for concluding that Egan was not being reasonably cooperative with efforts to find him in-patient treatment.

That he subsequently called a number of halfway houses in an effort to find a place that would accept him immediately for long term treatment does not change this conclusion. The medical records from Brattleboro Retreat show that Egan and the social worker there tried to find him halfway house placement and even arranged for him to interview at one facility. But they learned that there were significant waiting periods before he could be admitted to any of them. I

credit Egan's testimony that he followed up these attempts to obtain halfway house placement. But it should have come as no surprise to him that none had immediate openings. He did not take the opportunity to place himself on any waiting lists for a bed, insisting instead on trying to find an immediate opening that he should have known would not be available. As Lecca pointed out at the hearing, had Egan sought the assistance of the Holyoke office, it might have been better able to find a suitable facility than he could have on his own. While Egan did make some effort, that effort was so unlikely to succeed that it cannot show that Lecca incorrectly concluded that he failed to be reasonably cooperative with efforts to obtain him in-patient substance abuse treatment. Rather the record shows, as the Department of Veterans' Services concluded in its October 15, 2007 decision, that the Lecca "has gone above and beyond in her attempts to aid this client" who has "repeatedly refused this help." Ex. 5

Accordingly, I affirm the decision to terminate Egan's veterans' benefits. I note that this decision does not preclude Egan from applying in the future for veterans benefits, so long as he meets the criteria for eligibility of veterans with substance abuse problems, as described in this decision. I note as well that the Holyoke Veterans' Services Department has offered to assist him in finding an in-patient treatment program whether or not he is receiving veterans' benefits.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
Administrative Magistrate

Dated: June 23, 2008